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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-116

DIANE M. PLACE, *Petitioner,*

v.

CASPAR WEINBERGER, *et al.*

SUPPLEMENTAL BRIEF IN SUPPORT OF CERTIORARI

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Petitioner files this supplemental brief pursuant to Rule 24(5) in support of her Petition for a Writ of Certiorari presently pending before this Court.

The decision of the Sixth Circuit in the instant case is in conflict with the decisions of two courts of appeals issued since the filing of the Petition. The Court of Appeals for the District of Columbia in *Womack* v. *Lynn*, 8 EPD ¶ 9709 (October 1, 1974), held that section 717 of the 1964 Civil Rights Act does apply to discrimination occurring prior to March 24, 1972, the date on which that section became law. In the instant case the Sixth Circuit reached the opposite conclusion. Petition, pp. 12a-15a. In *Bowers* v. *Campbell* (No. 72-1273) (October 24, 1974), the Ninth Circuit upheld federal jurisdiction to hear claims of discrimination in federal employment, even though section 717 was inapplicable, a position rejected

by the Sixth Circuit below. Petition, pp. 15a-17a.[1] Two new district court opinions have been reported reaching opposite conclusions as to whether section 717 applies to discrimination prior to March 24, 1972. *Day* v. *Weinberger*, 8 EPD ¶ 9646 (D.D.C. 1974); *Willingham* v. *Lynn*, 8 EPD ¶ 9618 (E.D. Mich. 1974).

The decision in *Womack* is of particular importance. The government, in opposing Certiorari, argues that the admitted conflict between the circuits is a narrow one because the Fourth Circuit, while applying section 717 to discrimination prior to March 24, 1972, may limit that rule to cases in which the final administrative determination occurred after March 24, 1972. Memorandum for Respondents in Opposition, pp. 2-3. See *Koger* v. *Ball*, 497 F.2d 702 (4th Cir. 1974); *Clark* v. *Goode*, 499 F.2d 130 (4th Cir. 1974).[2] In *Womack*, however, the final administrative determination had occurred on September 8, 1970, 18 months before the enactment of section 717. The Court of Appeals nonetheless held section 717 applicable in *Womack*, and expressly rejected the reasoning of the Sixth Circuit in the instant case.[3] Accordingly the conflict be-

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[1] *Bowers* upheld jurisdiction, *inter alia*, under the Administrative Procedure Act, 5 U.S.C. §§ 701-06, a statute expressly relied on by Petitioner herein. Petition, p. 23.

[2] *Clark* does not so limit the prior decision in *Koger*. In *Clark* the administrative proceedings had been exhausted in January 1971, but suit was not filed until February 7, 1973. The Fourth Circuit did not reach the question of whether section 717 applied to claims not "pending" administratively on March 24, 1972, since it concluded that even if the section were so applicable the plaintiff in *Clark* had failed to commence his action within the time required by law. 499 F.2d at 133.

[3] After noting the opinions of the Sixth Circuit, below, and the Fourth Circuit in *Koger*, the court in *Womack* concluded:

> "Having examined carefully both opinions, as well as the many District Court opinions and the arguments of the parties before us, we are persuaded that the Fourth Circuit's

tween the circuits is not limited as asserted by respondents.

The practical importance of the question presented by this case is discussed at pp. 11-14 of the Petition. To date there are 22 reported lower court decisions on whether section 717 applies to discrimination occurring before its effective date, most of them decided within the last year. The number of as yet unreported cases presenting this question is doubtless substantially greater. Almost half of all reported cases filed under section 717 have involved discrimination prior to March 24, 1972. Many of these cases are class actions, and the rights of thousands of federal employees are at stake. The rights of such employees should not turn on the circuit in which they happen to work. Although the government describes this question as "not of continuing significance",[4] the government has every intention of continuing to use this issue as its most significant obstacle to judicial review of claims of discrimination.

Respondents do not deny that the conflict regarding section 717 will be important for many years in determining the scope of injunctive relief available to redress continuing practices of discrimination which originated before 1972. The government suggests, however, that Title VII forbids awards of back pay for discrimination prior to March 24, 1972, unless an administrative complaint was filed before March 24, 1974. This is incorrect. Section 706(g), 42 U.S.C. 2000e-5(g), referring to charges filed with the Equal Employment Opportunity Commission,

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analysis is the better, both standing alone and in light of its convincing rebuttal of the statutory construction linchpin of the *Place*, decision. Accordingly we adopt the reasoning of *Koger*." 8 EPD p. 5952.

[4] Memorandum For The Respondents In Opposition, p. 3.

provides: "Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." This two year statute of limitations does not apply to charges of *federal* discrimination, for those charges are not filed with or considered by the Commission, but are processed by the agency or department where the employee works. See 42 U.S.C. § 2000e-16. Even if the two year statute of limitations did apply to federal employees, the back pay claims affected by the conflict in circuits—those filed before March 24, 1974—would include over 6,000 individual complaints[5] in addition to such classes of employees as those complainants might represent.

The present conflict among the circuits is an open invitation to forum shopping. An aggrieved federal employee suing under section 717 may file that action either in the district where he or she works, or in the District of Columbia. 42 U.S.C. § 2000e-5(f)(3). A federal employee working in the Sixth Circuit, or in any other circuit or district adopting the constricted view of section 717 used below, can evade that restriction and obtain more complete relief by suing instead in the District of Columbia where the law is controlled by *Womack* v. *Lynn*, 8 EPD ¶ 9709 (D.D.C. 1974). This difference in the applicable law will be important for many years to come to federal employees suing to redress patterns of continuing discrimination which generally arose prior to 1972. Certiorari is usually granted to resolve conflicts among the circuits precisely for the purpose of avoiding such forum shopping.

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[5] See Memorandum from Anthony W. Hudson, Director, Office of Federal Equal Employment Opportunity to Irving Kator, Assistant Executive Director, entitled "Government Wide Equal Employment Opportunity Counseling and Discrimination Complaint Activity, Fiscal Year 1972 to Fiscal Year 1974."

The Solicitor General, although opposing Certiorari, does not undertake to defend the merits of the decision of the Court of Appeals. The decision below is clearly in conflict with this Court's decision in *Bradley* v. *School Board of the City of Richmond*, 40 L.Ed. 2d 476 (1974). Under these circumstances, and in order to avoid further delay in the implementation of Section 717, Petitioner would urge that a Writ of Certiorari issue to review the judgment and opinion of the Sixth Circuit and that that judgment be reversed *per curiam*.

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